

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 15, 2007

STATE OF TENNESSEE v. JOSHUA J. MCKISSICK

Appeal from the Circuit Court for Robertson County
No. 04-0303 Michael R. Jones, Judge

No. M2006-01996-CCA-R3-CD - Filed October 1, 2007

The Robertson County Circuit Court found the defendant, Joshua J. McKissick, guilty of possession with intent to sell over 26 grams of cocaine, *see* T.C.A. § 39-17-417 (2006), after a bench trial on March 15, 2005, and sentenced the defendant to eight years in the Department of Correction. The defendant appealed, arguing: (1) that the general sessions court denied him counsel at the preliminary hearing in violation of his Sixth Amendment right to counsel; (2) that the trial court erred in denying his request for the identity of the confidential informant; (3) that the trial court erred in denying the suppression of evidence obtained in a search of the defendant's person incident to arrest; and (4) that the evidence was insufficient to convict the defendant of possession with intent to sell. After a thorough review of the record, arguments, and law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Ann M. Kroeger, Springfield, Tennessee, for the appellant, Joshua J. McKissick.

Robert E. Cooper, Jr., Attorney General & Reporter; Benjamin A. Ball, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Jason White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The proof at trial showed that on May 3, 2004, Springfield Police Narcotics Agent Charles Bogle received a call from a confidential informant that the defendant was in a small yellow car "on Circle Drive, almost at 49." Agent Bogle had had three or four prior "dealings" with the defendant and knew that there were outstanding warrants for the defendant's arrest. Thus, he traveled to the area and observed the defendant sitting in the passenger seat of a vehicle fitting the description. He called for backup officers and then stopped the vehicle.

Springfield Police Officer Purcell Jackson testified that he arrived on the scene and placed the defendant under arrest while Agent Bogle investigated the driver and another passenger of the vehicle. Officer Jackson handcuffed the defendant and searched his person before placing the defendant in his patrol car. Officer Jackson found a white powdery substance, weighing scales, plastic bags, and \$70 in cash on the defendant's person. Tennessee Bureau of Investigation Agent Glen J. Glen determined that the white powdery substance was 30.1 grams of cocaine hydrochloride. Agent Bogle testified that the large quantity of cocaine in conjunction with plastic bags and scales was indicative of possession for sale.

The trial court agreed and stated that the amount of cocaine, the weighing scales that could weigh amounts up to 100 grams, and the numerous plastic bags indicated intent to sell. The court also noted that the defendant had cash on his person. Therefore, the court found the defendant guilty of possession of over 26 grams of cocaine with intent to sell. *See* T.C.A. § 39-17-417(a)(4), (i)(5).

The defendant claims on appeal that (1) the general sessions court denied him counsel at the preliminary hearing in violation of his Sixth Amendment right to counsel; (2) the trial court erred in denying his request for the identity of the confidential informant; (3) the trial court erred in denying the suppression of evidence obtained in a search of the defendant's person incident to arrest; and (4) the evidence was insufficient to convict the defendant of possession with intent to sell.

I. Right to Counsel at Preliminary Hearing

The defendant contends that his Sixth Amendment right to counsel was violated because the general sessions court failed to appoint him an attorney at his preliminary hearing although both affidavits of indigency that he submitted reflected zero income. The defendant first raised this issue in his new trial motion; no pretrial motion or objection was tendered.

At the preliminary hearing, Tennessee Highway Patrol troopers testified that they investigated a hit-and-run accident on April 30, 2004, which led them to issue warrants for the defendant's arrest. This accident formed the basis of counts one through seven in the present case. Subsequently to the preliminary hearing but before the bench trial on the current May 3, 2004 drug charges, the State dismissed those seven counts, leaving only the drug charges, which were alleged in the alternative. Agent Bogle¹ testified at the preliminary hearing to the May 3, 2004 drug charges. This testimony was in line with the testimony he gave at trial. Thus, the trial court ruled that the error was harmless.

On appeal, the State argues that the defendant waived the issue by failing to prepare an adequate record. We note that the appellate record contains the defendant's general sessions court affidavits of indigency, the latest of which notes an income of zero, a determination that the

¹The preliminary hearing transcript does not list the full name of the officer who testified to the information because the tape was indiscernible. We surmise, based on the testimony, that it was Agent Bogle who testified.

defendant was not indigent, and the preliminary hearing transcript showing that the defendant was not represented by counsel. In the transcript of another evidentiary hearing, defense counsel stated that it was the policy of the particular general sessions judge who handled the defendant's case that an affidavit that reflected an income of zero was false. Furthermore, the defendant did include the issue in his amended new trial motion, and the trial court decided the issue. Thus, in the interest of justice, we will review the issue.

In *McKeldin v. State*, 516 S.W.2d 82 (Tenn. 1974), the supreme court held "that a preliminary hearing is a critical stage in a criminal prosecution in Tennessee; . . . that a criminal defendant is guaranteed the right to counsel at a preliminary hearing; [and] . . . that the state must provide competent counsel for an indigent defendant at the preliminary hearing." *Id.* at 86.

The defendant submitted two affidavits of indigency reflecting zero income, which support his claim that he should have been appointed counsel at the preliminary hearing. We have reviewed the transcript from the preliminary hearing, and we agree with the trial court that Agent Bogle's testimony was in line with his trial testimony. We recognize that in *McKeldin* the court stated in dicta that although discovery is not a preliminary hearing's primary purpose, the hearing is "a golden opportunity . . . to learn the precise details of the prosecution's case, and to engage in that happy event sometimes known as a 'fishing expedition.'" *Id.* at 85-86. In this situation, however, we see no defense-useful information which could have been obtained at the preliminary hearing. At trial, defense counsel ably cross-examined Agent Bogle, revealing essentially the same testimony as the preliminary hearing. Thus, we find the error harmless beyond a reasonable doubt. *See Coleman v. Alabama*, 399 U.S. 1, 11, 90 S. Ct. 1999, 2004 (1970) (holding that denial of counsel at a preliminary hearing in violation of the Sixth Amendment right to counsel is subject to harmless error analysis); *McKeldin*, 516 S.W.2d at 86-87.

II. Identity of Confidential Informant

The defendant also complains that the trial court erred in denying his request for the identity of the confidential informant.

At the evidentiary hearing, Agent Bogle testified that he had previous knowledge of defendant's outstanding arrest warrants prior to the call from the confidential informant. The informant told Agent Bogle of the general area in which the defendant could be found, what type of car he was in, and that he possessed cocaine. Agent Bogle testified that the informant did not know how the defendant got the cocaine and did not inform him how the informant saw the cocaine.

On appeal, the State argues that the defendant waived the issue because he failed to cite to the record. *See* Tenn. R. App. P. 27(a)(7) ("The brief of the appellant shall contain . . . [a]n argument . . . with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on"); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated

as waived in this court.”). However, the defendant does cite to the record in other sections of his brief. Thus, we will review the issue.

Generally, the identity of a confidential informant is privileged from disclosure. *House v. State*, 44 S.W.3d 508, 512 (Tenn. 2001); *State v. Vanderford*, 980 S.W.2d 390, 395 (Tenn. Crim. App. 1997). The State is not required to divulge such informant’s identity unless (a) disclosure is essential to a fair trial by being relevant to and promotive of a defense, (b) the informant was a participant in or witness to the crime, or (c) the informant has knowledge that is favorable to the defendant. *Vanderford*, 980 S.W.2d at 397. The defendant “has the burden of establishing by a preponderance of the evidence that the confidential informant’s identity is material to his defense because the informant was a witness to the crime, participated in the crime, or possesse[d] facts favorable or relevant to the defendant.” *Id.*

In the present case, no such materiality was shown. Although the defendant’s location was provided by the informant, the arrest was prompted by outstanding warrants. Thus, the trial court did not err in denying the defendant’s request for the identity of the confidential informant.

III. Search Incident to Arrest

The defendant also complains that the trial court erred in failing to suppress the results of the search incident to his arrest. The State argues that the defendant waived the issue because the defendant failed to file a motion to suppress, the court held no hearing on the issue, and the defendant failed to cite to authority in his brief. A careful review of the record reveals that the defendant filed a motion, although not captioned “Motion to Suppress.” The “Motion for Dismissal of Indictment” claimed that the search incident to arrest was illegal. In addition, the court held a suppression hearing prior to the bench trial and specifically ruled that the search incident to arrest was legal and the evidence, therefore, was admissible.

The State is correct, however, that the defendant failed to cite authority in his brief for this issue. Thus, he waived the issue. *See* Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

IV. Sufficiency of the Evidence

Last, the defendant challenges the sufficiency of the convicting evidence. When an accused challenges the sufficiency of the evidence, an appellate court’s standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

As applicable to the present case, “[i]t is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to . . . sell the controlled substance,” *see* T.C.A. § 39-17-417(a)(4), and cocaine is a Schedule II controlled substance, *see id.* 39-17-408(b)(4). It is a Class B felony to sell more than 26 grams of cocaine. *See id.* § 39-17-417(i)(5). Furthermore, Code section 39-17-419 states, “It may be inferred from the amount of controlled substance or substances possessed by an offender, along with other relevant facts surrounding arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing.” *See id.* § 39-17-419.

The defendant argues that the proof is insufficient regarding the element of intent to sell. The proof showed that the defendant had on his person 30.1 grams of cocaine hydrochloride. The defendant also possessed weighing scales, plastic bags, and cash. The culpable mental state most often is proven by circumstantial evidence. *See Hall v. State*, 490 S.W.2d 495, 496 (Tenn. 1973); *State v. Timmy Lee Hill*, No. M2005-01126-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Nashville, May 17, 2006). Thus, the trier of fact must make inferences as to the defendant’s mental state from the surrounding circumstances. *See Timmy Lee Hill*, slip op. at 6; *Poag v. State*, 567 S.W.2d 775, 778 (Tenn. Crim. App. 1978). Moreover, we consider “whether ‘under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference’ beyond a reasonable doubt.” *Timmy Lee Hill*, slip op. at 7 (quoting *County Court of Ulster County v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225 (1979)). From all of the evidence, including the large quantity of cocaine, the trial court could have reasonably inferred and concluded beyond a reasonable doubt that the defendant was guilty of possession with intent to sell. *See id.*, slip op. at 6-7 (stating that jury could make inferences from circumstances, as stated in Code section 39-17-419, as to defendant’s intent to sell); *see also State v. Keusi Yamba Donald*, No. W2005-01524-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Jackson, Nov. 7, 2006) (holding that jury could have reasonably inferred from the large amount of drugs and other surrounding circumstances that defendant was guilty of possession with intent to sell or deliver beyond a reasonable doubt).

V. Conclusion

Based on the foregoing analyses, we affirm the judgment of the trial court.

JAMES CURWOOD WITT, JR., JUDGE